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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PEARL INVESTMENT COMPANY,
a California partnership,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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April 4, 1986

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QUESTIONS PRESENTED

1. Is abstention proper where, by the Ninth Circuit Court of Appeals' own admission, there are no unsettled questions of state law and the only question is the application of settled principles of state law to an unresolved set of facts?

2. Notwithstanding the explicit directive of the United States Congress that the federal courts shall enforce the Civil Rights Act of 1871, is it proper for the Ninth Circuit Court of Appeals to establish, in effect, a *per se* rule of abstention in all land use cases that denies an aggrieved plaintiff a federal forum in actions brought under 42 U.S.C. § 1983?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Pearl Investment Company, respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Ninth Circuit entered on October 29, 1985.

OPINIONS BELOW

The Opinion of the Court of Appeals appears in Appendix B to this petition. The Opinion and Order of the United States District Court for the Northern District of California appears in Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 29, 1985. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on February 12, 1986. The Ninth Circuit's Order appears in Appendix A to this petition. A motion to stay the mandate was granted by the Court of Appeals until March 21, 1986. A subsequent motion to extend the stay of the mandate was also granted, extending the stay until April 4, 1986, the date of this petition for certiorari. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition concerns the application of the U.S. Supreme Court created doctrine known as *Pullman* abstention to claims brought under 42 U.S.C. § 1983 involving land use. Section 1983 of the United States Code, Title 42, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

This petition also concerns the democratic principle of separation of powers as established in Articles I and III of the Constitution of the United States. Article I, Section 1 of the Constitution provides:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article III, Section 1 of the Constitution provides:

> The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

STATEMENT OF THE CASE

This case arises out of an application for a building permit submitted by Petitioner to the City of San Francisco. Petitioner is the owner of an improved parcel of land located in the vicinity of the Civic Center Complex in the City of San Francisco. The property, which is zoned for commercial use (C-2), has been owned and used by Petitioner for commercial and residential uses for many years. In 1981, Petitioner submitted an application for a building permit to convert the residential portion of the property to commercial offices, a use permitted in the C-2 district. By law, the City was required to make a determination of completeness of Petitioner's application within 30 days. Despite this requirement and the mandatory provisions of the City's Administrative Code which required that notice of an environmental review be issued within 45 days after the application was filed, the City took no action on the permit until July 2, 1982 when the City advised Petitioner that an "environmental review" would have to be conducted. At a public hearing in January of 1983, the City's Planning Department requested that the Planning Commission subject Petitioner's application for a building permit to "discretionary review," a standardless process for the review of developments of "significant concern."[1]

Thereafter Petitioner was subjected to innumerable bureaucratic delays in violation of provisions of the City Administrative Code until April 21, 1983 when the Planning Commission voted to grant a building permit subject to nine onerous conditions, including the requirement that half of the residential units could not be converted to offices; that the Petitioner provide replacement housing for the tenants of the units to be

[1] Under the discretionary review provision of the City's Municipal Code, the City was free to invoke discretionary review at any time during the processing of Petitioner's permit application. The City did so over a year after Petitioner had filed a complete application.

converted; and that the Petitioner pay relocation costs to the tenants.

Petitioner filed an action in the Federal District Court for the Northern District of California under 42 U.S.C. § 1983 alleging that the City's action violated its federal Constitutional rights of procedural and substantive due process, equal protection of the law and the just compensation clause of the Fifth Amendment. The District Court, in response to an affirmative defense filed by the City, abstained invoking the *Pullman* doctrine of abstention. Petitioner appealed to the Ninth Circuit Court of Appeals on the grounds that the case did not involve any unsettled questions of state law and that the District Court had abused its discretion when it abstained, depriving Petitioner of a Congressionally established federal forum for the vindication of violations of federal constitutional rights. The Ninth Circuit affirmed, holding that "the resolution of state law questions is doubtful in virtually every case involving land use or zoning issues," and in so doing established a *per se* rule of abstention in land use cases.

BASIS FOR FEDERAL JURISDICTION IN THE COURT BELOW

The complaint, *sub judice*, invoked the jurisdiction of the federal courts under the provisions of 42 U.S.C. §§ 1983 and 1985 and 28 U.S.C. §§ 1331, 1343, 2201 and 2202.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The decision of the Ninth Circuit Court of Appeals has taken this Court's rule of comity and federalism first announced in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) and converted what has always been a narrow exception to the federal courts' duty to exercise its Congressionally-mandated jurisdiction under 42 U.S.C. § 1983 into what amounts to a *per se* rule of abstention for all matters involving "land use or zoning issues." Petitioner respectfully submits that the decision below constitutes a dramatic and erroneous extension of the abstention doctrine that directly conflicts with the holdings of this Court and the decisions of the other Federal Courts of Appeal. Moreover, the *per se* abstention rule adopted by the Ninth Circuit completely frustrates the obvious Congressional intent in enacting the Civil Rights Act of 1871 and thereby violates principles of separation and balance of governmental powers.

A.

THE JUDICIAL DOCTRINE OF PULLMAN ABSTENTION IS AN EXTRAORDINARY AND NARROW EXCEPTION TO A FEDERAL COURT'S DUTY TO ADJUDICATE A CASE PROPERLY BEFORE IT

The doctrine of abstention was established by this Court in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) as a very narrow exception to the general obligation of the federal judiciary to hear and decide cases properly brought before it. This obligation was perhaps best expressed by Chief Justice Marshall in his opinion in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821):

> The Judiciary cannot, as the Legislature may, avoid a measure because it approaches the confines of the Con-

> stitution. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.

Since *Pullman*, this Court has repeatedly emphasized that abstention is justified only in "narrowly limited special circumstances." *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 509 (1972); *Zwickler v. Koota*, 389 U.S. 241, 248 (1967). Just two years ago in *Hawaii Housing Authority v. Midkiff, et al.*, ____ U.S. ____, 104 S.Ct. 2321, 2327 (1984), this Court again cautioned that abstention is a narrow exception to the rule that the federal courts have an obligation to exercise their vested jurisdiction. Under *Pullman*, abstention is appropriate only where a question of general state law is uncertain, and abstention will serve to avoid a potentially erroneous construction of the state law by the federal court.

1.

This Court's Decisions Hold That Pullman Abstention Is Justified As A Narrow Exception To The Exercise Of Federal Jurisdiction Only When There Is A Specific Issue Of State Law That Is Uncertain

In *Gibson v. Berryhill*, 411 U.S. 564 (1973), this Court stated "that when confronted with issues of Constitutional dimension which *implicate or depend upon unsettled questions of state law*, a federal court ought to abstain and stay its proceedings until *those state law questions* are definitively resolved." *Id.* at 574 (emphasis added).

> Regard for the interest and sovereignty of the state and the reluctance needlessly to adjudicate Constitutional issues may require a Federal District Court to abstain from

> adjudication if the parties may avail themselves in an appropriate procedure to obtain state interpretation of state laws *requiring construction.*

Zwickler v. Koota, 389 U.S. at 250 (emphasis added). *See also Harris County Commissioners Court v. Moore*, 420 U.S. 77, 80-87 (1975).

If there are no unsettled questions of state law, then abstention is improper. Even where a particular issue has not been addressed by the state courts, abstention is improper if the resolution of the state law question is certain from other decisions or sources. *Harman v. Forssenius*, 380 U.S. 528, 534-35 (1965); *Meridith v. Winter Haven*, 320 U.S. 228, 232, 234-35 (1943). Nor is abstention justified where resolution of a federal question may result in the overturning of state policy. *Zablocki v. Redhail*, 434 U.S. 374, 379-80 n.5 (1978). Simply put, abstention is the exception, not the rule. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976).

This Court has in effect established a two prong test that must be satisfied in order for abstention to be appropriate: (1) the state law in question must be unclear; and (2) the state law must be subject to an interpretation that will avoid the federal Constitutional question. *Zwickler v. Koota*, 389 U.S. at 251 n. 14.

And, in order for a federal court to invoke abstention, the court must identify with particularity the issues that are critical to the outcome of the federal litigation and involve questions of state law that are *actually unclear*. *Harman v. Forssenius*, 380 U.S. at 534; *Kollsman v. City of Los Angeles*, 737 F.2d 830, 839 (Reinhardt, J., dissenting).[2] In *Hawaii Housing Authority v. Midkiff, et al.*, ____ U.S. ____, 104 S.Ct. at 2327, this Court rejected the suggestion that *Pullman* abstention can be founded

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[2] In its opinion below, the Ninth Circuit acknowledged this analytical obligation in determining the appropriateness of abstention. *See* App. B at B-6.

on an abstract suspicion of uncertainty or on a theoretical possibility that state court adjudication could obviate the need to reach a federal question:

> In the abstract, of course, such possibilities always exist. But the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary. Rather, "[w]e have frequently emphasized that abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction." *Zwickler v. Koota*, 389 U.S. at 241, 251 & n. 14.

Furthermore, this Court in *Midkiff* explained that the concern in *Pullman* to avoid "needless friction with state policies" was founded upon the *Pullman* Court's specific identification of an *unsettled* question of general state law that was susceptible of a limiting construction:

> In *Railroad Comm'n v. Pullman Co., supra*, this Court held that *federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided.* By abstaining in such cases, federal courts will avoid both unnecessary adjudication of federal questions and "needless friction with state policies...." *Id.*, 312 U.S. at 500. However, *federal courts need not abstain on Pullman grounds when a state statute is not "fairly subject to an interpretation which will render unnecessary" the federal constitutional question.*

Midkiff, 104 S.Ct. at 2327 (emphasis added).

Notwithstanding these clear precedents, the Ninth Circuit has established a *per se* rule authorizing abstention whenever the subject matter of the action is zoning or land use.[3] Petitioner respectfully submits that in so doing the Ninth Circuit has grossly distorted the principles upon which the *Pullman* doctrine is based and literally overturned the solemn judgment of the Congress of the United States. Moreover, Petitioner has no idea whatsoever what state law questions need to be litigated in state court. The Municipal Code provision under which the City acted has been definitively construed by the California Supreme Court on two separate occasions and Petitioner has no interest in a third trip around the state court's jurisprudential merry-go-round. Plainly put, Petitioner accepts the California court's construction of the San Francisco code provision and

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[3] The source of aberration in the Ninth Circuit's abstention rule may be found in that Circuit's elevation of certain of Justice Frankfurter's language in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) to a formal test, thereby creating a third prong to this Court's established two-prong test for applying the *Pullman* abstention doctrine. Before reaching the questions of whether a federal complaint involves (i) an unsettled question of general state law that is (ii) subject to an interpretation that will avoid the federal Constitutional question, the Ninth Circuit first determines whether the complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." *Canton v. Spokane School District #81*, 498 F.2d 840, 845 (9th Cir. 1974). Justice Frankfurter's statement in *Pullman* was made in the context of racial discrimination. *See* 312 U.S. at 498. In its decisions subsequent to *Pullman*, this Court has neither reiterated Justice Frankfurter's reference to sensitive Constitutional issues nor made it a criterion for abstention. *See Zwickler v. Koota*, 389 U.S. 241, 248-49 (1967); *Harrison v. NAACP*, 360 U.S. 167, 177 (1959); *Chicago v. Fieldcrest Dairies*, 316 U.S. 168, 173 (1942).

As created and applied by the Ninth Circuit, this "social sensitivity" prong of its so-called *Canton* test for *Pullman* abstention has so outweighed the Ninth Circuit's analysis under the principal abstention criteria established by this Court that the Circuit's decisions have effectively equated "sensitive areas of social policy" with unsettled questions of state law.

alleges that the result of that construction has violated and continues to violate its federally secured rights, a violation the United States Congress determined should be redressable in federal court.

2.

This Court Has Held That An Action Brought Under 42 U.S.C. § 1983 Is The Least Appropriate Candidate For Abstention

The objective of Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, is to provide persons access to the federal courts to vindicate violations of civil rights. The Congressional debates on the Act focused on the need for a federal right of action to protect private rights in the face of the failure of state courts to enforce the law with an equal hand.[4] Section 1983, the cornerstone of the Act, was premised on the view that a state denied Constitutional protection of private rights whenever its judicial or executive authorities consistently, "permanently and as a rule"[5] refused to enforce its laws for the protection of a class of persons. In support of its belief, Congress vested jurisdiction in the federal courts to enforce this Civil Rights statute.[6]

Beginning with *Monroe v. Pape*, 365 U.S. 167 (1961), this Court rendered a series of decisions that significantly expanded the scope of Section 1983. In its analysis of the legislative history of Section 1983, this Court stressed the fact that: "the purposes [of § 1983] were much broader. The . . . aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Monroe*, 365 U.S. at 174.

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[4] *See* CONG. GLOBE, 42nd Cong., 1st Sess. at 342, 368, 374, 428, 444, 457-59, 460, 476, 505-06, 653, App. 78, 167, 185, 248-49, 252.

[5] *See* CONG. GLOBE, 42nd Cong., 1st Sess. at 334.

[6] *See* 28 U.S.C. §§ 1331, 1343.

Subsequently, in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) and *Owen v. City of Independence*, 445 U.S. 622 (1980), this Court held that the Civil Rights Act of 1871 was also intended to provide a federal remedy for municipal conduct that violates fundamental Constitutional rights. The Court has consistently declined to order abstention in cases involving civil rights claims. *Harman v. Forssenius*, 380 U.S. 528 (1965); *Griffin v. County School Board*, 377 U.S. 218, 228-29 (1964). *But see Harrison v. NAACP*, 360 U.S. 167 (1959); *Procunier v. Martinez*, 416 U.S. 396 (1974). That property rights are fundamental civil rights deserving of protection under 42 U.S.C. § 1983 is now well established under the decisions of this Court. *See Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972); *McNeese v. Board of Education*, 373 U.S. 668 (1963). Land use cases brought under 42 U.S.C. § 1983 are no exception to the federal courts' Congressionally-mandated duty to adjudicate cases properly before them.

B.

THE NINTH CIRCUIT'S DECISION ESTABLISHES IN EFFECT A PER SE RULE OF ABSTENTION IN LAND USE CASES THAT EFFECTIVELY DENIES PETITIONER A FEDERAL FORUM UNDER 42 U.S.C. § 1983

At the heart of the Ninth Circuit's misadventure is a fundamental misreading of this Court's abstention decisions which leads the Ninth Circuit into the erroneous assumption that an unsettled question of state law exists in "virtually every" zoning or land use case. This misapprehension involves the erroneous equation of the unresolved question of the *application* of state law to a particular set of circumstances with an unsettled question of state law principle of general application. What the Ninth Circuit has done is to hold that the inevitable

ad hoc nature of zoning and land use disputes, revolving around what Justice Rehnquist has described in open court as *post hoc* rationalizations, means that there is an unsettled question of state law in every such case and, therefore, that abstention is appropriate in every such case. Petitioner submits that, to the contrary, the *Pullman* doctrine authorizes abstention only where there exists a state law principle of *general application* that is *unclear*. Simply put, Petitioner submits that the Congress, through its Constitutional authority, vested jurisdiction in the federal courts over exercises of state power that affect civil rights. This Court established a narrow exception that defers to state courts on questions of unsettled state principles, but preserves to the federal courts the application of state law principles once clear to a specific set of circumstances. The Ninth Circuit in turn has extended abstention doctrine far beyond the narrow exception established in *Pullman* and has held as a matter of law, that the doubt created by the application of settled state law principles to a particular set of circumstances is a sufficient unsettled question of state law to override the Congressional mandate of 42 U.S.C. § 1983.

I.

The Ninth Circuit Improperly Equates Unsettled Questions Of State Law With The Application Of Settled Principles To An Unresolved Set Of Facts In A Land Use Case

Astonishingly, the Ninth Circuit in this cause stated that there were *no* unsettled questions of state law:

> Resolution of an issue of state law might be uncertain because the particular statute is ambiguous, or because the precedents conflict, or because the question is novel and of sufficient importance that it ought to be addressed first by a state court. *We do not find those factors to be present in this case. Here there is much force to Pearl's contention that the district court could have ascertained the established standards applied by the California courts in reviewing zoning decisions and accordingly should have applied those standards without deferring to state adjudication.*

App. B at p. B-10 (emphasis added).

Notwithstanding its conclusion, the Court affirmed the district court's abstention because "[w]e do not write on a clean slate." App. B at p. B-11. The Court explained that it was constrained to sustain abstention because of the Ninth Circuit's prior decisions.[7] Abstention was appropriate in this "land use" case, therefore, because "the resolution of state law questions is doubtful in virtually every case involving land use or zoning issues." App. B at p. B-9. Petitioner submits that it is impossible to read *Pullman* and its progeny without understanding that the unsettled question of state law this Court has deferred to state court consideration must involve an uncertain proposition of *general law*, not merely the uncertainty inherent in the application of a general legal principle to a particular set of circumstances.

In the case *sub judice*, the Petitioner presented a claim of deprivation of its federal due process rights under San Francisco Municipal Code Section 26, a provision that twice before had been construed and upheld by the California Supreme Court as satisfying the constitutional requirements for the delegation of discretionary power under state law. *See City and County of San Francisco v. Superior Court of City and County of San Francisco*, 347 P.2d 294, 305 (Cal. 1959); *Lindell Co. v. Board of Permit Appeals of City of County of San Francisco*, 144 P.2d 4 (Cal. 1943). Unlike the circumstance supporting abstention in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), Petitioner did not challenge the City's "authority" under state law to impose discretionary review to its permit application. Rather, it challenged on federal Constitutional grounds the result of the application of a legal principle twice-decided by the California Supreme Court to a particular set of circumstances.

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[7] *See Sederquist v. City of Tiburon*, 590 F.2d 278 (9th Cir. 1978) and *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838 (9th Cir. 1979).

2.

The Ninth Circuit's Per Se Rule Of Abstention Will Result In Petitioner's Federal Claims Being Barred Under The Principles Of *Res Judicata* And Collateral Estoppel

The Ninth Circuit's *per se* rule creates an absurd situation when considered in the context of *res judicata*. The doctrine of *res judicata* (a doctrine of judicial repose) precludes the parties or their privies from relitigating issues that were or could have been raised in a prior action. *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876). Under the related doctrine of collateral estoppel, a prior decision in which a court has decided an issue of fact or law necessary to the judgment in that action will preclude relitigation of the same issue in a suit based on a different cause of action but involving a party to the first action. *Montana v. United States*, 440 U.S. 147, 153 (1979). In the decisions of *Allen v. McCurry*, 449 U.S. 104 (1980) and *Migra v. Warren County School District Bd. of Education*, ____ U.S. ____, 104 S.Ct. 892 (1984), this Court held that these doctrines of preclusion are applicable to actions brought under 42 U.S.C. § 1983. In the *Allen* case, this Court noted that contrary to the dissenting view of Justice Blackmun,[8] its decision did not constitute an abandonment of the principle established in *England v. Medical Examiners*, 375 U.S. 411 (1964) that under *Pullman* abstention, a plaintiff who is remitted to state court is not precluded from litigating his federal constitutional issues later in federal court. *See* 449 U.S. 101 n. 17.

Petitioner respectfully submits, however, that this Court's decisions in *England* and in *Allen* never contemplated the impossible circumstance in which the Ninth Circuit's abstention rule places Petitioner and all plaintiffs in land use cases brought under § 1983. The assumption underlying the *England* prin-

[8] *Allen v. McMurry*, 449 U.S. 90, 112 (1980) (Blackmun, J., dissenting).

ciple is that there is an actual unsettled question of general state law which may be referred to the state court for adjudication without a determination of the federal Constitutional claims. Because land use cases inevitably involve mixed questions of fact and law, the effect of the Ninth Circuit's abstention rule where there are no unsettled questions of general state law is to compel a federal plaintiff, without his consent, to submit his federal constitutional claims to a state court determination. In this cause there are no unsettled questions of state law to raise in the state court; the only issues are the Constitutional claims that are pending before the federal district court, to which claims. Respondent has already filed an answer. If, as here, state court litigation depends upon the resolution of mixed questions of law and fact then Petitioner will be barred from relitigation under the doctrine of *res judicata* and will thereby be deprived of the federal forum that Congress deemed appropriate in 1871. *See Key v. Wise*, 454 U.S. 1103 (1981) (mem.) (Brennan, J., dissenting from denial of certiorari); *Hernandez v. City of Lafayette*, 699 F.2d 734 (5th Cir. 1983). On the other hand, if *res judicata* is not preclusive, then the abstention rule established by the Ninth Circuit would allow a petitioner two bites at the "land use" apple, an extraordinary perversion of the principles of comity and judicial efficiency on which the *Pullman* decision was based.

C.

THE DECISION BELOW CONFLICTS WITH THE APPLICABLE DECISIONS OF OTHER FEDERAL CIRCUITS

The decisions of this Court are emphatic in stating that each abstention decision is a matter of discretion which must be approached on a case-by-case basis, and not as a matter of the application of a general rule. *Baggett v. Bullitt*, 377 U.S. 360 (1964). Abstention is proper only in narrowly limited "special circumstances." *Propper v. Clark*, 337 U.S. 472, 492 (1949). While the Ninth Circuit Court of Appeals has paid lip service to

this admonition, its decisions, in fact, reflect the application of a general rule of abstention in all land use or zoning cases.

In no other federal circuit § 1983 decisions in which abstention has been considered in a land use context has the Ninth Circuit's form of abstention analysis been applied to create a *per se* rule of abstention. *See Urbanizadora Versalles v. Rivera Rios*, 701 F.2d 993, 998 (1st Cir. 1983); *Boraas v. Village of Belle Terre*, 476 F.2d 806, 811-12 (2d Cir. 1973), *reversed on other grounds*, 416 U.S. 1 (1974); *Heritage Farms, Inc. v Solebury Township*, 671 F.2d 743, 746-747 (3d Cir. 1982); *Fralin & Waldron, Inc. v. City of Martinsville, Virginia*, 493 F.2d 481, 483 (4th Cir. 1974); *Hill v. City of El Paso*, 437 F.2d 352, 357 (5th Cir. 1971); *Muskegon Theatres, Inc. v. City of Muskegon*, 507 F.2d 199, 204 (6th Cir. 1974); *Ahrensfeld v. Stephens*, 528 F.2d 193, 197 (7th Cir. 1975); *United States v. City of Black Jack*, 508 F.2d 1179, 1183 (8th Cir. 1974); *City of Moore v. Atchison, Topeka & Santa Fe Ry.*, 699 F.2d 507, 510 (10th Cir. 1983); *Nasser v. City of Homewood*, 671 F.2d 432, 439-440 (11th Cir. 1982); *Silverman v. Barry*, 727 F.2d 1121, 1123-34 (D.C. Cir. 1984).

In fact, over the past ten years, in the only circuit court decisions brought under 42 U.S.C. § 1983 involving land use or zoning in which abstention has been ordered, abstention was based on the fact that there existed a *pending state court proceeding* with which the federal court did not wish to interfere. *See Hill v. City of El Paso*, 437 F.2d 352, 353, 357 (5th Cir. 1971); *Forest Hills Utility Company v. City of Heath*, 539 F.2d 592, 594 (6th Cir. 1976); *Ahrensfeld v. Stephens*, 528 F.2d 193, 195 (7th Cir. 1975); *Central Avenue News, Inc. v. City of Minot*, 651 F.2d 565, 567 (8th Cir. 1981). Except for the decision in the earlier *Hill* case, these decisions relied in essence upon this Court's decision in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), extending the principle of abstention articulated in *Younger v. Harris*, 401 U.S. 37 (1971) to state-initiated civil proceedings. In all other circuit court § 1983 cases

involving land use over the last ten years, the circuit courts have declined to abstain. *See Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993 (1st Cir. 1983); *Boraas v. Village of Belle Terre*, 476 F.2d 806 (2d Cir. 1973), *reversed on other grounds*, 416 U.S. 1 (1974); *Heritage Farms, Inc. v. Solesbury Township*, 671 F.2d 743 (3d Cir. 1982); *Silverman v. Barry*, 727 F.2d 1121 (D.C. Cir. 1984).

The Ninth Circuit, on the other hand, has equated the existence of an "array" of state and local land use laws and regulations in the State of California with the existence of unsettled questions of state law. *See Rancho Palos Verdes Corporation v. City of Laguna Beach*, 547 F.2d 1092, 1094-95 (9th Cir. 1976). Speaking of the denial of a building permit, the court in *Sederquist v. City of Tiburon*, 590 F.2d 278 (9th Cir. 1978), stated:

> Whether a city has abused its discretion by refusing to issue a building permit is by nature a question turning on the peculiar facts of each case in light of the many local and statewide land use laws and regulations applicable to the area in question. We do not claim the ability to predict whether a state court would decide that the city here abused its discretion. . . .

Id. at 282-83.

Petitioner submits that the foregoing language from the *Sederquist* case, the same language quoted by the Ninth Circuit in its decision below, *see* App. B at p. B-11, is no more than a presumption of uncertain state law based upon the existence of a complex but not unfathomable array of land use laws and regulations in the State of California.[9] Such a statement as

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[9] Petitioner notes that while the Ninth Circuit's quotation from the *Sederquist* case in its decision below implies deference to a complicated state regulatory scheme in the area of land use similar to the type of regulatory scheme that prompted this Court to abstain in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the Ninth Circuit has explicitly held that *Burford* abstention is not applicable to California land use cases. *See Isthmus Landowners Association, Inc. v. California*, 601 F.2d 1087, 1090 (9th Cir. 1979); *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1096 (9th Cir. 1976).

quoted above cannot substitute for the precise analysis this Court has required in determining whether there are, in fact, specific unsettled questions of general state law which could be decided by a state court so as to avoid the federal constitutional questions raised. In the seven § 1983 abstention decisions involving land use or zoning that have been rendered by the Ninth Circuit since *Rancho Palos Verdes* and *Sederquist*, the Ninth Circuit has ritualistically invoked its axiom that the array of state and local land use regulations makes "land use," by definition, a sensitive area of social policy which inherently involves unsettled questions of state law. *See Pearl Investment Company v. City and County of San Francisco*, No. 84-2345 (9th Cir. October 29, 1985) (App. B, B-9); *Bank of America National Trust and Savings Association v. Summerland County Water District*, 767 F.2d 544, 546 (9th Cir. 1985); *C-Y Development Company v. City of Redlands*, 703 F.2d 375, 377, 380 (9th Cir. 1983); *Shamrock Development Co. v. City of Concord*, 656 F.2d 1380, 1385 (9th Cir. 1981); *The Isthmus Landowners Association, Inc. v. The State of California*, 601 F.2d 1087, 1091 (9th Cir. 1979); *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 841 (9th Cir. 1979); *Newport Investments, Inc. v. City of Laguna Beach*, 564 F.2d 893, 894 (9th Cir. 1977).

The Ninth Circuit's decision below is the latest in a series of *per se* abstention decisions in § 1983 cases involving land use that diverges from the application of the *Pullman* abstention doctrine in the other federal circuits. Furthermore, in no decision has this Court articulated the general rule applied below by the Ninth Circuit in which uncertainty is found imbedded in every land use or zoning decision merely because the federal court must examine a complex array of statutes and ordinances in order to resolve the mixed questions of law and fact before it. As this Court has said: "[T]he mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit." *Lehman Brothers v. Schein*, 416 U.S. 386, 390 (1974). In sum, the case *sub judice*

is a case in which a federal appellate decision has so fundamentally departed from the accepted and usual course of judicial proceedings under the *Pullman* abstention doctrine as to warrant the exercise of this Court's power of supervision.

D.

THE NINTH CIRCUIT'S PER SE RULE OF ABSTENTION VIOLATES THE SEPARATION OF GOVERNMENTAL POWERS

Article I of the Constitution of the United States provides that "[a]ll legislative Power of the United States, shall be vested in a Congress of the United States."[10] Article III of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[11] This Court has construed this division of powers under the Constitution as meaning that "the federal lawmaking power is vested in the legislative, not the judicial, branch of government." *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 95 (1981). In the celebrated "snail darter" case, *TVA v. Hill*, 437 U.S. 153 (1978), this Court underscored the importance of the separation of powers principle as a direct restraint upon judicial lawmaking:

> Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While "[i]t is emphatically the province and duty of the judicial department to say what the law is," . . . it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. *Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.*

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[10] U.S. CONST. art. I, § 1.

[11] U.S. CONST. art. III, § 1.

437 U.S. at 194 (citations omitted) (emphasis added) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

The Civil Rights Act of 1871 clearly reflects the ordering of priorities by Congress. In fact, it constitutes a restructuring of the relationship between the state and federal courts[12] so as to ensure the effective enforcement of Constitutional rights. It reflects a legislative social policy judgment that the federal courts cannot disregard on any grounds other than unconstitutionality. *TVA v. Hill*, 437 U.S. at 194.

The Ninth Circuit's adoption of a *per se* rule of abstention in all cases involving land use or zoning because of its stated uncertainty in deciding questions of fact in light of "the many local and statewide land use laws" constitutes a weighing of social and political policies—a function that the Constitution has assigned to the legislative branch under the separation of powers principle. Where, as in this case, the federal court acknowledged in its opinion that the pertinent state law issues are not uncertain yet nevertheless invoked *Pullman* abstention, its decision constitutes an improper judicial incursion into a substantive area where Congress has already spoken. The Ninth Circuit's decision to affirm the district court's abstention decision on the basis of prior Circuit Court decisions finding uncertain resolution of state law questions implicit in virtually all land use or zoning cases directly undermines the enforcement of the Civil Rights Act and thereby violates the principle of separation-of-powers between the legislative and judicial branches.[13]

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[12] See CONG. GLOBE, 42nd Cong., 1st Sess., 149 (Comments of Rep. Garfield).

[13] The needless and unfounded abstention ordered by the Ninth Circuit in the decision below will also effect a delay or forever foreclose the exercise of federal jurisdiction—a result that Congress never contemplated in enacting the Civil Rights Act of 1871. This Court has previously condemned such unnecessary delay that results from the application of the abstention doctrine. *Meredith v. Winter Haven*, 320 U.S. 228, 237 (1943). *See also* C. Wright, LAW OF FEDERAL COURTS, § 52 at 225 (1976); L. Tribe, AMERICAN CONSTITUTIONAL LAW, § 3-40 at 151 (1978).

CONCLUSION

The Ninth Circuit's decision below effectively establishes a *per se* rule of abstention in all land use and zoning cases. As applied by the Ninth Circuit to land use cases brought under 42 U.S.C. § 1983, the doctrine of *Pullman* abstention has become a means to thwart the Congressional judgment in adopting the Civil Rights Act of 1871; and as such, the Ninth Circuit's *per se* rule of abstention has converted an extraordinary and narrow exception to the federal court's duty to exercise its jurisdiction into a device that, practically, deprives federal plaintiffs of a federal forum. In contrast to all of the other Circuits of this nation, the Ninth Circuit has chosen to exclude § 1983 land use cases from the federal courthouse. Neither the Constitution nor the legislative history of the Civil Rights Act of 1871 supports such judicial lawmaking by the Ninth Circuit. Petitioner respectfully submits that the fundamental constitutional rights at stake in the Ninth Circuit's decision and the serious conflict of that decision with this Court's abstention jurisprudence compel review by this Court.

For all of the foregoing reasons Petitioner respectfully prays that this Honorable Court grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision in this case.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEARL INVESTMENT COMPANY,

Plaintiff-Appellant,

-vs-

CITY AND COUNTY OF SAN FRANCISCO, A MUNICIPAL CORPORATION,

Defendant-Appellee.

CA No. 84-2345
DC No. 84-0063

ORDER

[Filed: February 12, 1986]

BEFORE: ANDERSON AND CANBY, CIRCUIT JUDGES AND REA*, DISTRICT JUDGE

The panel has voted unanimously to deny the petition for rehearing and suggestions for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

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* The Honorable William J. Rea, United States District Judge for the Central District of California, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEARL INVESTMENT COMPANY, a California partnership,
Plaintiff-Appellant,

-vs-

CITY AND COUNTY OF SAN FRANCISCO, a Municipal corporation,
Defendant-Appellee.

CA No. 84-2345
DC No. 84-0063

OPINION

[Filed: October 29, 1985]

Appeal from the United States District Court
for the Northern District of California
Robert P. Aguilar, District Judge, Presiding
Argued and Submitted May 14, 1985
—San Francisco, California

BEFORE: ANDERSON AND CANBY, CIRCUIT JUDGES AND REA,* DISTRICT JUDGE.

CANBY, Circuit Judge:

Pearl Investment Company (Pearl) brought this civil rights action against the City and County of San Francisco (City) alleging that the City Planning Commission (Commission) violated the fifth and fourteenth amendments in acting upon a building permit application filed by Pearl. The sole issue on appeal is whether the district court abused its discretion in postponing the exercise of its jurisdiction pursuant to the *Pullman* abstention doctrine. We affirm.

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* The Honorable William J. Rea, United States District Judge for the Central District of California, sitting by designation.

BACKGROUND

Pearl owns two buildings in an area of San Francisco zoned for community business. The property has been used for eight commercial shops and twenty-four residential units. On December 31, 1981, Pearl filed an application with the City's Department of Public Works for a building permit to renovate the buildings for office use. Pearl was not apprised of the status of its application until July 2, 1982, when the Department of City Planning (Department) advised Pearl by letter that an environmental review would be required before the application was processed. After that review, the Department, on November 19, issued a Preliminary Negative Declaration that stated that the building renovation would not have a significant environmental impact. A tenants' association appealed that decision to the Commission. At the appeal hearing, the Commission affirmed the Department's issuance of the Negative Declaration and granted the Department's request for discretionary review.

The Commission employs discretionary review, under its powers in the City's Charter Section 7.500[1] and the City's Municipal Code, Part III, Section 26[2], to implement the policies

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[1] Charter § 7.500 provides that:

> [n]o permit or license that is dependent on or affected by the zoning set-back or other ordinances of the city and county administered by the city planning commission, shall be issued except on the prior approval of the city planning commission.

[2] San Francisco Municipal Code, Part III, Section 26 provides that:

> [i]n the granting or denying of any permit, or the revoking or the refusing to revoke any permit, the granting or revoking power may take into consideration the effect of the proposed business or calling upon surrounding property and upon its residents, and inhabitants thereof; and in granting or denying said permit, or revoking or refusing to revoke a permit, may exercise its sound discretion as to whether said permit should be granted, transferred, denied or revoked.

of the City's Master Plan. Under discretionary review, Commission review extends beyond determining whether a proposed project complies with pertinent ordinances. The Commission may impose additional conditions tailored to the specific project and the objects [sic] of the Master Plan. In this case, the Commission conducted discretionary review because of its concern about the project's dislocation of residential tenants.

After two continuances, the Commission, on March 10, 1983, began public hearings as part of its discretionary review of Pearl's application. On April 21, the Commission voted "an intent to approve the project, subject to final language being brought before the Commission." At the final public hearing on May 5, the Commission conditionally approved the project as limited to eleven units. The conditions on approval included that Pearl offer relocation assistance to all tenants who did not voluntarily vacate the units by May 5, 1983, and that Pearl cause the development, within San Francisco, of eleven replacement dwelling units of a type and size comparable to those being converted. The motion approving the project referred to the new Residence Element of the City's Master Plan, which had been adopted by the Planning Commission during the afternoon session of April 21, 1983, after the Commission tentatively had approved Pearl's project.

Pearl petitioned in state court for a writ of mandate to compel the City to approve automatically its building application under Cal. Gov't Code §§ 65950 & 65956(b)(West 1983). The petition was denied. Pearl then filed this action in federal court under 42 U.S.C. §§ 1983 & 1985 (1982). The crux of Pearl's complaint is that the Commission exercised its discretionary review power under constitutionally defective provisions and that the Commission imposed the relocation and replacement housing conditions arbitrarily. The complaint alleges federal procedural and substantive due process claims, an equal protection claim and an inverse condemnation claim. Pearl seeks damages and declaratory and injunctive relief.

The City moved to dismiss Pearl's complaint on the ground that the district court should abstain. After a hearing on the motion, the district court exercised its discretion to abstain under the abstention doctrine first articulated in *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 498 (1941). The court, however, denied the City's request to dismiss the plaintiff's complaint and stayed the federal action pending state court adjudication of the state law issues. Pearl appealed the abstention order. We have jurisdiction to review a timely appeal of a *Pullman* abstention order. *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1093 n.1. (9th Cir. 1976).

DISCUSSION

The *Pullman* abstention doctrine allows district courts, in exceptional cases, to postpone the exercise of jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). Federal courts should abstain in cases presenting a federal constitutional issue if constitutional adjudication could be avoided or if the constitutional question could be narrowed by a ruling on an uncertain question of state law. *Hawaii Housing Auth. v. Midkiff*, 104 S. Ct. 2321, 2327 (1984); *Harman v. Forssenius*, 380 U.S. 528, 534 (1965); *Railroad Commission v. Pullman Co.*, 312 U.S. at 498. "[A]bstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Harman*, 380 U.S. at 534. This doctrine does not contemplate, however, that federal courts defer to state adjudication when the state law issues are settled or when the outcome is reasonably uncertain. [sic] *Id.* Abstention is proper only in exceptional cases where principles of comity and federalism justify postponing the exercise of jurisdiction that Congress conferred upon federal courts.

We review abstention orders for an abuse of discretion. *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983). The district court must exercise its discretion within the narrow and the specific limits of the abstention doctrine. *McIntyre v. McIntyre*, ____ F.2d ____, Slip op. at ____ (9th Cir. Sept. 18, 1983); *Pue v. Sillas*, 632 F.2d 74, 78 (9th Cir. 1980). We have identified three concurrent criteria for *Pullman* abstention:

> (1) The complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."
>
> (2) "Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy."

(3) The possibly determinative issue of state law is doubtful.

Canton v. Spokane School Dist. No. 81, 498 F.2d 840, 845 (9th Cir. 1974) (quoting *Railroad Commission v. Pullman Co.*, 312 U.S. at 498). In applying these criteria, the district court should identify the state law issues that might be determinative or critical to the case's outcome and should explain why the resolution of those issues is uncertain.

1. Sensitive Areas of Social Policy

Pearl contends that the district court applied what it perceived as this court's *per se* abstention rule in state and local land-use cases. Pearl argues that this case was brought to redress a violation of civil rights and should not be viewed as a land-use case. Pearl further contends that the district court's decision, in effect, restricts the scope of 42 U.S.C. § 1983 and deprives property owners of a meaningful remedy for the violation of civil rights under color of state law.

The Civil Rights Act protects property rights no less than individual liberties. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 542, 543 (1972). Federal courts should be reluctant to abstain in civil rights cases regardless of the type of constitutional interest at stake; abstention can delay the redress of significant constitutional wrongs. *See Canton v. Spokane School Dist.*, 498 F.2d at 845-46. The practical effect of abstention in these cases may be to impose an exhaustion requirement not appropriate to 42 U.S.C. § 1983. Nevertheless, abstention may be proper in a civil rights case to avoid unnecessary interference with an important state program. *See, e.g., Bank of America v. Summerland County Water Dist.*, 767 F.2d 544, 546-47 (9th Cir. 1985); *C-Y Development Co.*, 703 F.2d at 381 ("no *per se* civil rights exception to the abstention doctrine").

Pearl urges this court to abandon the "sensitive area of social policy" inquiry, which Pearl argues we apply unevenly.

We often have held that land-use planning questions "touch a sensitive area of social policy" into which the federal courts should not lightly intrude. *Bank of America*, 767 F.2d at 546; *Kollsman v. City of Los Angeles*, 737 F.2d 830, 833 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1179 (1985); *C.Y. Development Co.* 703 F.2d at 377; *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 840 (9th Cir. 1979); *Sederquist v. City of Tiburon*, 590 F.2d 278, 281 (9th Cir. 1978); *Rancho Palos Verdes Corp.*, 547 F.2d at 1094-95.

We recognize that we have at times declined to abstain in cases dealing with arguably more sensitive social issues. *See, e.g., Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527 (9th Cir. 1984)(zoning of adult theaters), *prob. juris. noted*, 105 S. Ct. 2015 (1985); *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir. 1984) (anti-obscenity statute), *rev'd on other grounds sub nom. Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794 (1985); *Toussaint v. Yockey*, 722 F.2d 1490 (9th Cir. 1984) (prison conditions); *Graham v. Deukmejian*, 713 F.2d 518 (9th Cir. 1983)(religious challenge to state policy discouraging doctors from performing surgery without blood transfusions). These abstention decisions, however, did not turn on the criterion of "sensitive issue of social policy," which is merely a starting point in our analysis. We do not feel free to discard the criterion entirely. Because most of Pearl's complaint is aimed at the City's application of the new Residence Element of its Master Plan, we conclude that the first criterion is met.

2. State Law Issues

Pearl next contends that its claims are predicated upon violations of federal constitutional rights and that resolution of state law issues would not eliminate or narrow the constitutional issues. Pearl's complaint does not raise independent state law claims; the due process claims, however, are framed in terms of violations of state law. In applying the second

criterion, the district court was free to consider the state law issues underlying the claims raised in the complaint. *Santa Fe Improvement Co.,* 596 F.2d at 840.

Pearl's complaint challenges on due process grounds the procedures followed in processing and reviewing its building application. A state court might find that the Commission failed to comply with mandatory procedures and accordingly might order the application approved as filed. *See* Cal. Gov't Code §§ 65943, 65950 (West 1983). Also, Pearl's complaint challenges the validity of the relocation and replacement unit conditions on substantive due process, equal protection, and inverse condemnation grounds. Under the California administrative mandamus procedure, Cal. Civ. Proc. Code § 1094.5 (West 1980 & Supp. 1985), a state court might invalidate those conditions if it found that the Commission had abused its discretion. *See Agins v. City of Tiburon,* 24 Cal. 3d 266, 276-77, 598 P.2d 25, 31, 157 Cal. Rptr. 372, 378 (1979), *aff'd on other grounds,* 447 U.S. 255 (1980); *Pfeiffer V. City of La Mesa,* 69 Cal. App. 3d 74, 78, 137 Cal. Rptr. 804, 806-07 (1977); *see also Sederquist v. City of Tiburon,* 590 F.2d at 282 (refusal to issue paving permit might be invalidated under California's administrative mandamus). We conclude that these state law issues might determine or narrow the federal constitutional questions. Consequently, this case satisfies the second criterion. *C-Y Development Company,* 703 F.2d at 379.

3. Uncertainty of state law

Our final and most difficult task is to determine whether the answers to the possibly determinative questions of state law are uncertain. Pearl argues with considerable force that none of those state law issues is uncertain. Regarding the challenged portion of the municipal code, Pearl argues that the state court interpretation is certain. The California Supreme Court has held that the City's Municipal Code, Part III, Section 26 satisfies California's constitutional requirements for the delega-

tion of discretionary power. *City and County of San Francisco v. Superior Court*, 53 Cal 2d. 236, 347 P.2d 294, 305, 1 Cal. Rptr. 158, 169 (1959) (permit review process is not a standardless delegation of legislative power); *Lindell Co. v. Board of Permit Appeals*, 23 Cal. 2d 303, 311, 144 P.2d 4, 9 (1943). Regarding the failure to observe mandatory time schedules, Pearl argues that the language of these provisions is unambiguous and that further construction of these provisions would not affect the constitutional questions. Pearl also observes that the City asserted *res judicata* as an affirmative defense to the Cal. Gov't Code §§ 65943 and 65950 claims. Finally, to the extent that state law on land regulation is unsettled, Pearl argues that state court interpretation of the new Resident [sic] Element will not alter the substantive due process, equal protection or inverse condemnation issues.

The City argues, however, that the challenged conditions may be invalidated in an administrative mandamus procedure. Whether the Commission abused its discretion in imposing the challenged conditions, it argues, turns on the peculiar facts of this case; consequently, the state law is uncertain. *See Santa Fe Land Improvement Co.*, 596 F.2d at 841; *Sederquist v. City of Tiburon*, 590 F.2d at 282-83. The district court concluded that "how the state courts will view the challenged laws and policies" is uncertain because the state courts have never interpreted the local ordinances at issue. In support, the court reasoned that this circuit "has taken the position that the resolution of state law questions is doubtful in virtually every case involving land use or zoning issues."

If this case presented an issue of first impression in this circuit, we would be inclined to agree with Pearl that the pertinent state law issues are not uncertain. An outcome is not "doubtful" or "uncertain" just because it turns on the facts of the particular case. Uncertainty for purposes of *Pullman* abstention means that a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law. *See* Field, *Abstention in Constitutional Cases: The*

Scope of the Pullman Abstention Doctrine, 122 U. Pa. L. Rev. 1071, 1090 (1974) (arguing that a "federal court should abstain only when the chance of error [in sense that the federal court's holding on a state law issue will be contradicted by the state's highest court] is reasonably great"). Resolution of an issue of state law might be uncertain because the particular statute is ambiguous, or because the precedents conflict, or because the question is novel and of sufficient importance that it ought to be addressed first by a state court. We do not find those factors to be present in this case. Here there is much force to Pearl's contention that the district court could have ascertained the established standards applied by the California courts in reviewing zoning decisions and accordingly should have applied those standards without deferring to state adjudication.[3]

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[3] Pearl also alleges that the City exceeded its police powers in imposing the relocation and replacement housing conditions and that these conditions constitute a taking under the fifth amendment. In the past, we have endorsed district courts' abstaining in inverse condemnation cases. *See, e.g., C-Y Development Co.*, 703 F.2d 375; *Santa Fe Land Improvement Co.*, 596 F.2d 838; *Sederquist*, 590 F.2d 278; *Newport Investments Inc. v. City of Laguna Beach*, 564 F.2d 893, (9th Cir. 1977). We reasoned that because California's prohibition against uncompensated takings is "highly similar" to the fifth amendment prohibition, it is "particularly appropriate that the California courts be afforded the initial opportunity of interpreting the constitution of their own state in relation to the complaint." *Sederquist*, 590 F.2d at 282 (quoting *Newport Investments Inc.*, 564 F 2d at 894). The Supreme Court has since cast doubt upon this reasoning. "Abstention is not required for interpretation of parallel constitutional provisions." *Hawaii Housing Auth. v. Midkiff*, 104 S. Ct. 2321, 2327 n.4 (1984).

In light of *Midkiff*, abstention solely on the basis of the inverse condemnation issue would appear inappropriate. *But cf. Bank of America v. Summerland County Water Dist.*, 767 F.2d 544 (9th Cir. 1985) (abstention in inverse condemnation case upheld, in part because California might reconsider its constitutionally doubtful controlling precedent).

We do not write on a clean slate, however. Addressing whether a City's conditions imposed in a paving permit might be invalidated under California's administrative mandamus procedure, this court stated:

> [w]hether a city has abused its discretion by refusing to issue a building permit is by nature a question turning on the peculiar facts of each case in light of the many local and statewide land use laws and regulations applicable to the area in question. We do not claim the ability to predict whether a state court would decide that the city here abused its discretion . . . .

Sederquist, 590 F.2d at 282-83. We concluded that the district court did not abuse its discretion in abstaining. *See also Santa Fe Land Improvement Co.*, 596 F.2d 838 (rezoning decision challenged; abstention appropriate). In view of these decisions, we cannot say that the district court abused its discretion in abstaining here.

CONCLUSION

The decision of the district court staying the exercise of its jurisdiction under the *Pullman* doctrine is AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PEARL INVESTMENT COMPANY, a California partnership,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,

Defendants.

CASE NO. C-84-0063-RPA

OPINION AND ORDER

Plaintiff is a real estate company that owns the property and building located at 350 Gough Street in San Francisco. The building currently contains 24 residential units. Plaintiff has proposed renovating the building and converting it to commercial uses. Specifically, plaintiff would like to convert the residential units into offices.

Plaintiff submitted an application for a building permit for the proposed project. The San Francisco City Planning Commission (CPC) conducted a public hearing on plaintiff's request. The CPC approved the plaintiff's planned renovation subject to two conditions. The conditions, which were the outgrowth of various City policies, were that plaintiff build eleven (11) replacement residential units within the City limits and that plaintiff assist the resident [sic] of 350 Gough in obtaining new dwellings.

Plaintiff strenously [sic] objects to the conditions established by the CPC. Plaintiff has lodged this complaint alleging that the CPC imposed the conditions pursuant to illegal and unconstitutional procedures and that the conditions imposed by the CPC are improper and unconstitutional. Plaintiff's complaint sounds in both procedural and substantive due process.

Defendant moves to dismiss on the ground that this Court should abstain from deciding issues of the sort presented in plaintiff's complaint. Specifically, defendant urges the Court to abstain under the *Pullman* abstention doctrine. Plaintiff, who has already met with some lack of success in the state courts, argues vigorously against the application of the abstention doctrine to this case.

PLAINTIFF'S COMPLAINT:

Plaintiff levels a great number of allegations at the CPC's action on plaintiff's application for a building permit. As the Court understands them, plaintiff's main allegations are as follows:

1. The City violated plaintiff's right to procedural due process by failing to comply with various time limits set forth in state and local laws governing environmental reviews.

2. The City violated plaintiff's right to procedural due process by failing to act on plaintiff's building permit application within one year.

3. The City violated plaintiff's right to procedural due process by imposing conditions on approval "at the last minute."

4. The provisions in the Charter, the San Francisco Municipal Code, and the City Planning resolution that authorize the CPC to review and act on plaintiff's building permit application are an unconstitutional standardless delegation of legislative power.

5. The CPC's review of plaintiff's application violated plaintiff's right to procedural due process because it was undertaken through a vague and arbitrary procedure.

6. The City's review of plaintiff's application for a building permit violated California Government Code section 65950 and 65956(b).

7. The CPC imposed conditions on plaintiff pursuant to the policies in "Residence Element of the City's Master Plan." Plaintiff alleges that this document bears no real or substantial relationship to public health, safety or welfare of the City and therefore is a violation of plaintiff's right to substantive due process.

8. The City's rent control policy as applied to plaintiff's application violates plaintiff's right to substantive due process because the rent control policy is not a proper exercise of the City's police power.

9. The program known as San Francisco Office/Housing Production Program, which is established and implemented by the Department of City Planning and the Mayor's Office of Housing and Community Development, constitutes an unlawful delegation of legislative power and on its face constitutes an unconstitutional deprivation of plaintiff's right to substantive due process.

10. The City's policy of placing upon owners of commercially zoned property the burden of preserving and replacing existing housing supplies constitutes a deprivation of plaintiff's right to equal protection.

11. The City's imposition of conditions on approval of plaintiff's application for a building permit constitutes a taking of property without just compensation and an unconstitutional interference with property rights.

Plaintiff seeks various forms of relief for the alleged wrongs enumerated above.

1. A declaration that the following aspects of the City's planning and decision process are unconstitutional on their face and as applied:

a) the City's discretionary review process,

b) the Residence Element of the City's Master Plan,

c) the the City's rent control ordinance,

d) the the City's Office/Housing Production Program.

2. A declaration that the City has a mandatory duty to approve plaintiff's application for a building permit if the application as originally submitted complies with applicable zoning ordinances, building codes and environmental regulations as they existed at the time.

3. A declaration that the City's failure to comply with certain time requirements set forth in state and local laws violated those laws.

4. An injunction against the City imposing conditions of relocation costs and replacement housing on property owners.

5. Compensatory damages.

6. Attorneys' fees.

DISCUSSION:

Defendant City and County of San Francisco asks this Court to abstain from ruling in this case. Defendant argues that the Court should leave many of the issues raised in this case to the state courts.

The Supreme Court has stated, and the Ninth Circuit has often repeated that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation v. U.S.*, 424 U.S. 800, 813 (1976). Although abstention is an exception to the generally recognized rule that federal courts should decide cases before them, the courts have recognized three categories of abstention. Under the *Burford* abstention, federal courts may abstain where federal adjudication of a claim "would be disruptive of state efforts to establish coherent policy with respect to a matter of substantial public concern." *Colorado River*, 424 U.S. at 814. A

second type of abstention is known by the name of the *Colorado River* decision. Under the *Colorado River* abstention, federal courts may abstain when consideration of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation" suggest that it would be most appropriate to allow the state courts to resolve the issues before the court. *Id.* 424 U.S. at 817. *Colorado River* abstention is generally used when there is a parallel state case in existence that would provide a more appropriate forum for resolving the issues in the federal case. Neither the *Burford* nor *Colorado River* doctrines are applicable to the instant case.

The most commonly used form of abstention is known as *Pullman* abstention. Its name and its guiding principles derive from the case of *Railroad Commission of Texas v. Pullman*, 312 U.S 496 (1941). Under the *Pullman* abstention doctrine, "a federal court should abstain in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959).

The leading Ninth Circuit decision on *Pullman* abstention is *Canton v. Spokane School District*, 498 F.2d 840 (9th Cir. 1974). The Court of Appeals interpreted *Pullman* as requiring abstention if three conditions exist:

> (1) The complaint touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.
> (2) Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.
> (3) The possibly determinative issue of state law is doubtful.

498 F.2d at 845. The question for this Court is whether the facts of the instant case comport with *Canton's* three requirements for application of the *Pullman* abstention doctrine.

At the outset, it is worth noting that the Ninth Circuit has affirmed a significant number of decisions to abstain under *Pullman* in cases that are at least facially similar to this case in that they involved issues of land use. It is, in fact, fair to say that the weight of Ninth Circuit authority would certainly favor abstention in this case. Plaintiff has marshalled sophisticated arguments against abstention. These arguments require that the Court closely inspect each of the three elements necessary for *Pullman* abstention in the Ninth Circuit.

As noted above, the first requirement under the *Canton* decision is that the complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." 498 F.2d at 845.

The Ninth Circuit has repeatedly held that issues of land use planning and zoning questions are sensitive areas of social policy. *See Rancho Palos Verdes v. City of Laguna Beach*, 547 F.2d 1092, 1095 (9th Cir. 1976); *Sederquest v. City of Tiburon*, 590 F.2d 278, 281-82 (9th Cir. 1978); *Santa Fe Land Improvement v. City of Chula Vista*, 596 F.2d 838, 839 (9th Cir. 1979); *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983). In *Rancho Palos Verdes*, the Court of Appeals said that "[f]ederal courts must be wary of intervention that will stifle innovative state efforts to find solutions to complex social problems." 547 F.2d at 1095. Similarly, in *C-Y Development*, the Ninth Circuit stated that delicate issues of local land use planning such as these are precisely the type of issues which should be left to the state courts to decide under the doctrine of abstention. 703 F.2d at 368. These statements evince the Circuit Court's belief that the federal courts should steer clear of deciding questions relating to state and local land use planning.

Plaintiff advances two arguments against the conclusion that this case involves an area that the Ninth Circuit has recognized as an area of sensitive social policy that may give

rise to *Pullman* abstention. First, plaintiff contends that this is not really a land use or zoning case. Plaintiff points out that its complaint is a civil rights complaint that sounds in constitutional law. Plaintiff maintains that civil rights complaints are not good candidates for abstention since the civil rights laws were specifically enacted to give federal courts jurisdiction over constitutionally based claims. Plaintiff in the *C-Y Development* case made the same argument, and the Ninth Circuit soundly rejected the position. The Court said "[w]e conclude . . . that there is no *per se* exception [sic] civil rights exception to the abstention doctrine. Although the Supreme Court has demonstrated a reluctance to order abstention in cases involving certain civil rights claims, such as voting rights, and first amendment rights of expression, we are not aware of any cases in which the Supreme Court or this court has indicated a reluctance to abstain in land use matters brought under 42 U.S.C. § 1983." *C-Y Development*, 703 F.2d at 381. The circuit's ruling in *C-Y Development* takes care of plaintiff's first argument against abstention.

Plaintiff also argues that the Ninth Circuit authority does not clearly hold that land use planning and zoning cases are appropriate for abstention. This position is simply not supported by the case law. The cases above plainly state land use planning and zoning related issues are sensitive areas of social policy that satisfy the first prong of the *Canton* test for *Pullman* abstention. Plantiff's reliance on Judge Orrick's decision in *Blodgett v. County of Santa Cruz*, 502 F.Supp. 204 (N.D.Cal. 1980), is misplaced. It is true that Judge Orrick declined to abstain in a land use case in *Blodgett*. However, the *Blodgett* case involved the *conduct* of county officials. In the *Smith v. City and County of San Francisco* case last December this Court observed that "Judge Orrick reasoned that because the constitutionality of state laws was not at issue, no important countervailing interests could be served by *Pullman* absten-

tion." C-83-3083 at P. 8 (N.D. Cal. Dec. 16, 1983). Because the instant case *does* involve a challenge to the constitutionality of state laws, by the very reasoning in *Blodgett,* this case is a candidate for *Pullman* abstention.

The second requirement the Ninth Circuit set forth in *Canton* is that constitutional adjudication might be avoided or altered if the federal court were to abstain. Although the language in *Canton* is very strong on effect [sic] of state court adjudication, subsequent cases have not required that the state court adjudication would eliminate the federal constitutional questions. As the Court of Appeals stated in its recent decision in *C-Y Development,* " [i]n none of our cases have we held that the deferral to state court must have the potential of entirely obviating all federal constitutional questions. On the contrary, several cases of our and of the Supreme Court have indicated that it is enough that the state court determination may obviate, in whole *or in part, or alter the nature of* the federal constitutional questions." 703 F.2d at 379 (emphasis in original) (citations omitted).

In the instant case, state court adjudication could completely resolve the federal constitutional questions or could at the very least dramatically alter the nature of the federal issues before the Court. A state court could hold that the procedures that plaintiff challenges are unconstitutional, or could construe the procedures in such a way to change the character of plaintiff's challenges. In this sense, the *C-Y Development,* decision is virtually on all fours with this case. In *C-Y Development,* the Court affirmed a district court's abstention in a section 1983 case challenging land use laws and policies. The same result should obtain in the instant case.

The third and final requirement from the *Canton* decision is that the state law questions are doubtful. If the federal court knew how a state court would resolve the state court issues, there would be no point to abstaining. The Ninth Circuit has taken the position that the resolution of state law questions is

doubtful in virtually every case involving land use or zoning issues. *See Santa Fe Land Improvement v. City of Chula Vista*, 596 F.2d at 841. Land use cases, by their very nature, turn to the peculiar facts of each individual case. *Id., see also, Sederquist v. City of Tiburon*, 590 F.2d at 282. A federal court would be hard-pressed to predict how a state court would resolve such factually unique cases. Further, the local ordinances at issue in this case have not been definitively interpreted by state courts as yet. Thus, there is also the doubtfulness of how the state courts will view the challenged laws and policies. Accordingly, this case also satisfies the third requirement for abstention under the *Pullman* doctrine.

Based on the foregoing analysis, the Court finds that this case satisfies the three *Canton* requirements for abstention under the *Pullman* doctrine. Consequently, the Court will grant the City's request that this Court abstain from addressing some of the issues raised in plaintiff's complaint.

The Court will not, however, grant the City's request that the Court dismiss plaintiff's complaint. The Ninth Circuit has been unequivocal in holding that when a district court abstains pursuant to the *Pullman* doctrine, the Court should not dismiss the complaint. Rather, the district court must retain jurisdiction of the federal questions but stay the federal action pending state court adjudication of the state law issues. *Isthmus Landowners Assoc. v. State of California*, 601 F.2d 1087, 1091 (9th Cir. 1979); *Santa Fe Land Improvement v. City of Chula Vista*, 596 F.2d 838, 841 (9th Cir. 1979); *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1096 (9th Cir. 1976).

Accordingly, and for good cause appearing, the Court hereby orders plaintiff's federal action stayed pursuant to the doctrine of *Pullman* abstention. The parties are advised to keep this Court apprised of developments in the state court proceedings. For this purpose, the Court hereby sets a further status conference for December 13, 1984, at 9:15 a.m.

IT IS SO ORDERED.

DATED: July 19, 1984

/s/
ROBERT P. AGUILAR
United States District Judge

(2)

No. 85-1625

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States
October Term, 1985

PEARL INVESTMENT COMPANY,
a California partnership,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the District Court abuse its discretion in ordering an action stayed under the *Pullman* abstention doctrine so that the state court could determine issues of state law pertaining to the imposition of conditions on the approval of an owner's building permit application?

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a California partnership,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner, engaged in the business of real property management in San Francisco, applied for a permit to convert 24 residential units to commercial use (the property currently consists of 8 commercial shops and 24 residential units).

The Charter of the City and County of San Francisco requires City Planning Commission approval prior to issu-

ance of a permit affected by the City Planning Code. Discretion to determine whether to approve planning permits is granted by that charter provision and by a municipal code provision which states as follows:

> In the granting or denying of any permit, or the revoking or the refusing to revoke any permit, the granting or revoking power may take into consideration the effect of the proposed business or calling upon surrounding property and upon its residents, and inhabitants thereof; and in granting or denying said permit, or revoking or refusing to revoke a permit, may exercise its sound discretion as to whether said permit should be granted, transferred, denied or revoked.

Petitioner's permit application was also subject to state and local laws requiring environmental review and to a state statutory scheme setting certain deadlines for local agencies to act on permit applications (Government Code Section 65920, *et seq.*, the Permit Streamlining Act).

Under its power of discretionary review, the City Planning Commission conducted a series of public hearings on Petitioner's permit application because of concerns raised by residents and property owners in the affected area over the dislocation of tenants in the building, the loss of affordable residential units, and the potential change in the mixed residential-commercial character of the neighborhood.

While the City Planning Commission had under consideration and took action on Petitioner's application, it also conducted hearings on and adopted amendments to the Residence Element of the City's Master Plan, calling for mitigation of hardships caused by the private demolition

of existing residential units. Such policies were adopted in light of data indicating that existing housing stock is virtually irreplaceable given the cost of new construction.

Prior to final Commission action on Petitioner's application, Petitioner filed a Petition for Writ of Mandate, Declaratory and Injunctive Relief in the San Francisco Superior Court seeking, *inter alia,* an order compelling issuance of its building permit pursuant to provisions of state and local law governing environmental review and provisions of the Permit Streamlining Act. Those allegations are repeated in the complaint Petitioner filed in Federal Court in connection with its allegations of constitutional violations.

The San Francisco Superior Court denied Petitioner's request for a writ of mandamus based on the alleged violations of these state and local laws.

Before the City Planning Commission took final action on its permit application, Petitioner indicated its willingness to modify its application to retain 13 dwelling units. The Commission approved the permit application (as modified, to retain 13 dwelling units), subject to various conditions, including those requiring Petitioner to provide financial relocation assistance to tenants and replacement of the residential units to be converted. Petitioner did not appeal that decision to the City's administrative appellate body, the Board of Permit Appeals.[1]

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[1]One issue in this action is the doctrine of the exhaustion of administrative remedies. The City's position is that the exhaustion requirement is applicable to the property owner under

(Continued on following page)

The Petitioner thereafter filed a Complaint in the United States District Court. The City sought an order directing abstention under the *Pullman* doctrine, which the District Court granted and the Court of Appeals affirmed.

REASONS FOR DENYING THE WRIT

In *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), the Court firmly established the principle that abstention is appropriate where the complaint:

> . . . touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is given. Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.

312 U.S. 496, 498.

The *Pullman* Court emphasized the importance of furthering harmonious relations between state and federal authority:

> Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law

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(Continued from previous page)

California law. *People v. Coit Ranch, Inc.* (1962) 204 Cal.App.2d 52. The property owner has not filed an appeal to the City's appellate administrative agency, the Board of Permit Appeals, and apparently takes the position that exhaustion is not necessary in either Federal or State Court.

> [Citation]; or the administration of a specialized scheme for liquidating embarrassed business enterprises [Citation]; or the final authority of a state court to interpret doubtful regulatory laws of the state [Citation].

312 U.S. 496, 500.

The Court in *Hawaii Housing Authority v. Midkiff*, — U.S. —, 104 S. Ct. 2321 (1984), described the *Pullman* doctrine as follows:

> In *Railroad Comm'n. v. Pullman Co., supra,* this Court held that federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided.

— U.S. —, 104 S. Ct. 2321, 2327.

In the case now before this Court, the District Court abstained based on the authority of *Pullman*. The Court of Appeals affirmed that decision, notwithstanding its conclusion that

> [i]f this case presented an issue of first impression in this circuit, we would be inclined to agree with Pearl that the pertinent state law issues are not uncertain.

Appendix B to Petition For Writ Of Certiorari, p. B-9.

Petitioner (hereinafter "Pearl") seeks a review of the decision of the Court of Appeals on the grounds that this case involves no uncertain issues of state law other than those inherent in any action involving the processing of a local land use permit application.

The City and County of San Francisco submits that this case does indeed involve uncertain issues of state law and that the uncertainty extends beyond the fact that this

case involves municipal action on a land use permit application.

One of the focal points of Pearl's complaint relates to the exercise by the City Planning Commission of its power of discretionary review.

The power of discretionary review, as it is commonly called, refers to the authority of the City Planning Commission to review building permit applications and to disapprove any application for reasons other than a violation of code restrictions. The authority for the exercise of that power is set forth in the San Francisco Charter, the City Planning Code and Section 26 of Part III of the San Francisco Municipal Code.

The role of the City Planning Commission in reviewing building permit applications extends beyond the consideration of whether the proposed project meets code requirements. City Planning Code Section 170 provides in relevant part:

> In their interpretation and application the provisions of this code shall be held to be minimum requirements.

Thus, compliance with the Building and Planning Codes is merely a "first step" in receiving approval for a proposed project. The duty of verifying that such compliance exists is imposed on the zoning administrator by charter directive.

The Planning Commission's powers and duties in considering proposed projects are guided not only by the "minimum requirements" of the Planning Code but also

by the criteria set forth in Planning Code Section 101, which embodies the objectives and purposes of the code.

In addition to the authority found in the City Charter and City Planning Code for the exercise of discretionary review, San Francisco Municipal Code, Part III, Article I, Section 26 authorizes the City Planning Commission to exercise this power. That section provides:

> In the granting or denying of any permit, or the revoking or the refusing to revoke any permit, the granting or revoking power may take into consideration the effect of the proposed business or calling upon surrounding property and upon its residents, and inhabitants thereof; and in granting or denying said permit, or revoking or refusing to revoke a permit, may exercise its sound discretion as to whether said permit should be granted, transferred, denied or revoked.

Thus, in acting on building permit applications, the City Planning Commission is vested with broad discretion based on consideration of the general public health, safety and welfare.

Pearl challenges the City's exercise of discretionary review over building permit applications on procedural and substantive due process grounds. It argues that the California Supreme Court has definitively ruled on the validity of that power, citing *Lindell Co. v. Board of Permit Appeals of City and County of San Francisco* (1943) 23 Cal.2d 303, 144 P.2d 4, and *City and County of San Francisco v. Superior Court* (1959) 53 Cal.2d 236, 347 P.2d 294, and that there are no issues of state law of uncertain resolution in light of those two decisions.

These two decisions do not, however, resolve the questions at issue in this action. San Francisco's legislative

scheme, which vests broad discretion in the Commission in its review of permit applications, was formulated in an era far different from today, both in terms of the complexity of urban life and the complexity of laws adopted to address difficult social problems.

Land use issues involve some of the most complex issues of public law facing legislative bodies today. In a modern urban environment, increasingly varied demands are being made by different groups upon space which has become increasingly more scarce and more valuable. As the density of the population increases, the complexity of the demands and the conflicts between them become more acute and pressing. Accordingly, governmental officials charged with the administration of laws must execute more subtle and sensitive discretionary powers.

Even a casual familiarity with recent urban planning issues reveals the varied legislative responses to these types of demands: ordinances regulating residential rents, the conversion of condominiums, and the conversion of residential hotels; the establishment of special use districts, including districts which control the conversion of housing units; and moratoria on development or the establishment of certain uses.

No California court has considered the scope of the power of discretionary review within the context of the more complex laws, at both the state and local levels, regulating land use. The two California cases that have considered discretionary review have done so in circumstances that were factually and procedurally far different from that in issue in this action. The first, *Lindell Co. v. Board of Permit Appeals of City and County of San Francisco*,

supra, decided in 1943 prior to the myriad of changes in the City's legislative scheme, considered disapproval by the Board of Permit Appeals of a large housing project (on what was apparently undeveloped property). The second, *City and County of San Francisco v. Superior Court, supra,* decided in 1959, authorized *approval,* not disapproval, of an application.

In the case at bar, the City placed conditions on the approval of Plaintiff's application, conditions which imposed an affirmative duty on the applicant to provide replacement housing to accommodate the housing problem which its project would create and to provide tenant relocation assistance. This is not a case of the denial of an application. The unresolved issue of state law turns on the power of an administrative agency, through its power to exercise discretion over the issuance of permits, to impose additional requirements on developers such as those involved in this action before it will approve a project. In light of the changes since 1943—both in society and in the complexity of state and local laws—it can hardly be said that the law in California is settled with respect to the power of discretionary review. Indeed, the scope of that power has yet to be delineated by the California courts. That task is one properly left to the State, first through its own administrative processes and thereafter through its own judicial system.

This action thus involves a central undecided issue of state law, thereby meeting each criterion used in determining whether *Pullman* abstention is appropriate.

In addition, resolution of the issues in this case requires a determination of the lawfulness of a variety of

actions undertaken pursuant to state and local law governing zoning permit applications: those taken pursuant to environmental review and the Permit Streamlining Act; those taken pursuant to the City's discretionary review procedure; the Commission's adoption of the Residence Element of the City's Master Plan; the City's adoption of its residential rent control scheme; and the adoption and implementation of the City's Office/Housing Production Program. Pearl's complaint is a broadside attack with respect to all of these legislative and administrative actions. See Appendix C to Petition for Writ of Certiorari, pp. C-2 - C-4.

Are these issues more properly decided by the State or Federal Courts?[2] There are certainly considerations favoring resolution by the State Courts. State Court judges handle a considerably greater volume of land use litigation and are, therefore, more familiar with land use problems in general and state and local legislation regulating the land use process in particular. Moreover, there is greater familiarity by the State Court with local conditions, including local expectations as to the appropriate balance between the property owner's right to the unrestricted use of his property against the public's right to affordable housing, tenant protections, a quality living environment, open space, and other planning considerations.

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[2]With respect to actions taken pursuant to environmental review requirements and the Permit Streamlining Act, Pearl itself acknowledged the appropriateness of State Court review by its filing of an action in State Court seeking an order compelling issuance of its building permit. Perhaps dissatisfied with the denial of that petition, Pearl repaired to Federal Court, apparently hopeful of a forum more favorably disposed to its complaints.

Federal Court intervention may stifle innovative state efforts to find solutions to complex social problems. There also exists the fear that, since virtually any violation of state law governing land use can be the basis for a due process or equal protection challenge, retention of federal jurisdiction of all land use cases will turn federal courts into a zoning board of appeals. These grounds for deferring to state adjudication have been recognized by various courts and legal commentators. *See Fralin and Waldron, Inc. v. City of Martinsville, Va.,* 493 F.2d 481 (4th Cir. 1974); *Kent Island Joint Venture v. Smith,* 452 F.Supp. 455, 462-3 (D. Md. 1978); *The American Bench,* 170-175, 185 M. Reincke ed. 1979; *Rancho Palos Verdes Corp. v. City of Laguna Beach,* 547 F.2d 1092, 1094-5 (9th Cir. 1976); and *Hill v. City of El Paso, Texas,* 437 F.2d 352 (5th Cir. 1971).

The conditions imposed on Pearl arose out of the Commission's concern over the loss of affordable housing and the displacement of tenants. In California, these issues are a matter of statewide, as well as municipal, concern. It is articulated state policy that cities and counties regulate the uses of land so as to preserve housing opportunities for all economic segments of the population. *See* Health and Safety Code Section 50002, *et seq.* (State Housing Policy); Government Code Section 65580 ("(d) Local and state governments have a responsibility to . . . make adequate provision for the housing needs of all economic segments of the community"); Section 65583(a) (housing element shall consider use of governmental constraints, "including land use controls . . . and local processing and permit procedures to promote housing for all income

levels"); Section 65583(c) (housing program shall establish development standards and zoning for "a variety of types of housing for all income levels, including rental housing"); Section 65590 (within the Costal Zone, "conversion or demolition of existing residential dwelling units occupied by persons and families of low or moderate income . . . shall not be authorized unless provision has been made for replacement of those dwelling units with units for persons and families of low or moderate income"). In determining the validity of the conditions challenged herein, a court may well be required to determine how reasonable such conditions are given the problem related to the City's limited supply of affordable housing. "Drawing the line" of demarcation between reasonable and arbitrary conditions is a determination properly left to the State's own judiciary in order to avoid possibly conflicting standards imposed by Federal Courts. *See Shamrock Development Co. v. City of Concord,* 656 F.2d 1380 (9th Cir. 1981).

Pearl asks this Court to review this case in order to decide whether *Pullman* abstention is appropriate in cases involving challenges to local decisions on land use permit applications even where there are no unsettled questions of general statutory provisions. The City submits, however, that this case does not provide an appropriate vehicle for resolution of that issue. This case involves an important question that the California courts have not addressed or decided. Where such a question is involved—and where the case in addition involves interpretation of a myriad of state and municiple provisions that must be analyzed in the context of a unique factual situation—the

trial court properly abstained and the Court of Appeal properly affirmed that decision. Abstention in this action will insure that the Federal Court does not unnecessarily decide issues of constitutional law and will allow for the determination of uncertain issues of state law in a manner that avoids needless disharmony between the State and Federal systems.

CONCLUSION

For all the foregoing reasons, the City and County of San Francisco respectfully prays that this Honorable Court deny the Petition for Writ of Certiorari in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PEARL INVESTMENT COMPANY,
a California partnership,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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INTRODUCTION

In this cause Petitioner seeks a Writ of Certiorari to review a decision of the Ninth Circuit Court of Appeals holding that *Pullman* abstention is appropriate in virtually any federal action involving land use, a holding, Petitioner submits, that is a subversion of the solemn judgment of the Congress of the United States, and a perversion of the *Pullman* doctrine established by this Court as a narrow exception to the federal court's duty to hear federal cases.

In 1871, Congress determined that persons should have access to federal courts to redress alleged violations of federal rights by actions taken under color of state law. The circum-

stances of that legislative judgment need no restatement here.[1] The Ninth Circuit has, however, by its decision in this cause, effectively amended 42 U.S.C. § 1983 to exclude particular federal rights from provisions of the Act when those rights are involved in land use cases, and that isn't right.

Petitioner has no quarrel with the principles of *Pullman* abstention but submits that the Ninth Circuit's *per se* rule is a far cry from the narrow exception established by this Court where an unresolved question of state law of general applicability is dispositive, or nearly so, of the federal question. In *Pullman,* the constitutionality of the Railroad Commission's order was held to be secondary to the question of whether the Commission was authorized under state law to issue the order in question. Given that the state law question had never been definitively resolved by a state court, this Court abstained. In contrast, neither the authority of the City nor the scope of the City's authority is at issue in this cause. The Petitioner, after a review of California law and, in particular, of two definitive holdings of the California Supreme Court sustaining the City's authority to exercise discretion over building permits and the scope of that authority, has not challenged the City's authority to exercise such discretionary review nor the scope of that authority. Rather, Petitioner on the face of the pleadings alleges that the discretion authorized and validated by California law violates the due process clauses of the United States Constitution because, *inter alia,* the authorized discretion is unfettered by any procedural safeguard or any standard of any kind.

The City's response is to ignore the Complaint by recasting the issues to serve its own needs (in effect suggesting that its Municipal Code provision is unlawful and should be tested again in a California court — a novel affirmative defense) and to argue that times have changed and that the prior California

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[1] *See Monell v. New York City Department of Social Services,* 436 U.S. 658 (1978).

decisions are obsolete because of the passage of time and the ever increasing complexity of modern land use law. To that end, Respondent's Brief is an elaborate exercise of legerdemain designed to give the settled issue before this Court an appearance of complexity and uncertainty. Passing over the absurdity of the City's argument on obsolescence[2] and the fact that only a very few years have passed since the prior decisions, the plain fact is that there is no unsettled question of state law and, indeed, the Ninth Circuit agreed.

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[2] Presumably the City believes that *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) are no longer good law because of the passage of time and the increased complexity of our society.

ARGUMENT

In its opinion, the Ninth Circuit Court correctly perceived that the "crux" of Petitioner's civil rights Complaint against Respondent is that the City's Planning Commission "exercised its discretionary review power under constitutionally defective provisions" pursuant to which it arbitrarily imposed relocation and replacement housing conditions. Petition for Writ of Certiorari, App. B at p. B-3. The Ninth Circuit found nothing in Petitioner's Complaint that was novel or of sufficient importance that it ought to be addressed first by a state court. Moreover, the Ninth Circuit concluded that the district court below could have ascertained and applied the applicable California standards for reviewing zoning decisions without deferring to state court adjudication. Petition, App. B at p. B-10.

Respondent's Brief ignores the posture of the abstention issue as defined in the Ninth Circuit's opinion and endeavors instead to create an uncertain state law issue premised upon "changed conditions."[3] Respondent's reasons in opposition to Petitioner's Writ are best summed up in the following language of its brief:

> In light of the changes since 1943—both in society and in the complexity of state and local laws—it can hardly be said that the law in California is settled with respect to the power of discretionary review. Indeed, the scope of that power has yet to be delineated by the California courts. That task is one properly left to the State, first through its own administrative processes and thereafter through its own judicial system.

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[3] Respondent's Brief also sidesteps the fact that Petitioner brought its action under 42 U.S.C. § 1983, an action which this Court repeatedly has held does not require prior exhaustion of administrative or judicial remedies. See *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982); *Williamson County Regional Planning Commission, et al v. Hamilton Bank of Johnson City*, ____ U.S. ____, 105 S.Ct. 3108 (1985).

(Respondent's Brief in Opposition at p. 9) The foregoing language seeks to recast the abstention issue in terms of a challenge to the "power" of the City Planning Commission to exercise its discretion to further general public health, safety and welfare objectives. Unlike the question presented in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), however, Petitioner does not challenge Respondent's "authority" to impose discretionary review,[4] nor does it challenge the "scope" of Respondent's power. What Respondent really is urging is that civil rights actions that somehow involve land use or zoning should be left to the administrative and judicial processes of the State of California, thereby transforming the doctrine of abstention into an exhaustion of remedies requirement — a proposition that not only is erroneous under this Court's prior rulings but also undermines the Congressional purpose in enacting the Civil Rights Act of 1871.

Respondent's Brief incorrectly suggests that *Pullman* abstention is justified merely to further "harmonious relations" between state and federal authority. That is not, however, a sufficient rationale to justify abstention. As Justice Frankfurter, the author of the *Pullman* decision, explained:

> The only reason for declining to entertain the suit is that *it may well be more desirable as a matter of State—Federal relations* for the order of a State agency to be reviewed originally in the State lower court and not to be challenged in the first instance in a federal court. It is not for me to quarrel with the wisdom of such a policy. *But Congress, in the constitutional exercise of its power to define the jurisdiction of the inferior federal courts, has decided otherwise* . . . .

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[4] In its pleadings filed before the Ninth Circuit on the abstention issue, Respondent acknowledged that Petitioner's Complaint does not involve a challenge to the City's authority, or scope of authority, to impose discretionary review, stating: "[Plaintiff] does not allege that the Commission acted outside its scope of authority under the legislation authorizing the exercise of discretionary review . . . ." Excerpt of Record on Appeal, Civil Docket Sheet, Pleading No. 14 at pp. 11-12.

Alabama Public Service Commission v. Southern Railway, 341 U.S. 341, 361 (1951) (Frankfurter, J., concurring) (emphasis added). The desire expressed in *Pullman* to avoid "needless friction with state policies" becomes relevant only when a question of general state law is, in fact, unclear. *Hawaii Housing Authority v. Midkiff, et al,* ____ U.S. ____, 104 S.Ct. 2321, 2327 (1984).

Petitioner shares the Respondent's concern about the loss of affordable housing, but that is not the issue in this case. Clothing its argument in such policy concerns does not obscure the fundamental contention of Petitioner's civil rights claim, namely, that conditions were imposed upon it pursuant to a discretionary review provision that on its face and as applied violated Petitioner's federally secured right to due process.

Respondent's Brief further suggests that federal court "intervention" may stifle innovative state efforts to find solutions to complex social problems. That issue is not determinative of the abstention issue raised in the petition before this Court. Petitioner respectfully submits that no local government has a constitutional right to "experiment" with a property owner's federally protected civil rights. Because abstention is the exception, not the rule, *Colorado River Conservation Dist. v. United States,* 424 U.S. 800, 813 (1976), it is not even justified where resolution of the federal question could result in the overturning of state policy. *Zablocki v. Redhail,* 434 U.S. 374, 379-80 n. 5 (1978). Innovative land use controls that are drafted with proper procedural safeguards are more likely to be upheld by the courts than innovative land use controls that are applied through a discretionary review procedure such as Section 26 of the San Francisco Municipal Code—a provision that is devoid of any standards to insure that procedural and

substantive due process is afforded applicants whose building permits are subjected to the City's exercise of discretionary review.[5]

In sum, contrary to the wishful assertions in Respondent's Brief, the Ninth Circuit did not hold that the scope of the City's discretionary review authority, or its right to exercise that authority, is unsettled. Rather, the Ninth Circuit held that the mere fact that the dispute involved land use required abstention because of its prior decisions that the resolution of state law questions is doubtful in "virtually every case involving land use or zoning issues." Therein lies the fatal flaw in the Ninth Circuit's decision that provides a compelling reason for issuance of the Writ. *Pullman* abstention is appropriate where a cause involves the application of an unsettled question of state law of general applicability to a particular set of facts. *Pullman* does not apply to the application of a settled principle of law to an unsettled question of fact — which is the rule that the Ninth Circuit has now established.

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[5] Respondent's Brief also suggests that federal court deference is warranted by virtue of the state courts' greater familiarity with local conditions. This argument is the least compelling of all. The United States Code of Judiciary and Judicial Procedure provides that every federal district court judge must be a resident of the district in which he or she sits. *See* 28 U.S.C. § 134(b). Moreover, the greater the claim that may be made for a state court's special expertise and sensitivity in construing a certain regulatory scheme, the greater the availability—particularly in California—of clarifying legal materials to guide the federal court.

CONCLUSION

For the reasons set forth herein and in its Petition, Petitioner respectfully prays that this Honorable Court grant a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision in this case.

Respectfully submitted,

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